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Out of Court Administration Appointment Reform: Hardy Solution or Another Fine Mess?

Chris UMFREVILLE*

Introduction

1 Administration has been the leading non-terminal insolvency procedure in the United Kingdom since the Enterprise Act 2002[1] reforms to the Insolvency Act 1986 (the "Act").[2] The introduction of a streamlined process, including the ability to appoint administrators out-of-court, has resulted in administration accounting for between 55-77% of all non-terminal processes each year since 2003, compared to a high of 23% before the reforms.[3]

2 The reforms allowed the holder of a qualifying floating charge,[4] a company or its directors[5] to appoint administrators by the filing of prescribed documentation in accordance with the provisions of the Act and Insolvency Rules 1986 (the "Rules").[6] The court also retained the power to appoint administrators upon petition by a variety of interested parties.[7] A clear majority of all administration appointments are now made by the company or its directors out-of-court, under paragraph 22 of Schedule B1 to the Act.[8] This has, however, not been without problem.

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* Chris Umfreville is a Senior Lecturer and Course Leader of the Legal Practice Course at the University of Wolverhampton, United Kingdom.

[1] Enterprise Act 2002 (2002 c.40).

[2] Insolvency Act 1986 (1986 c.45).

[3] Available at: <http://webarchive.nationalarchives.gov.uk/20140311023846/http://www.insolvencydirect.bis.gov.uk/otherinformation/statistics/historicdata/HDmenu.htm> (last viewed 3 December 2014).

[4] Paragraph 14, Schedule B1, Insolvency Act 1986.

[5] Ibid., paragraph 22.

[6] Insolvency Rules 1986 (SI 1986/1925).

[7] Paragraph 10, Schedule B1, Insolvency Act 1986.

[8] See, for example, C. Umfreville, P. Walton and P. Wilson, "Pre-Pack Empirical Research: Characteristic and Outcome Analysis of Pre-Pack Administration" (2014), Part A1.6, available at:

3 With the court no longer directly involved in every administration appointment, it has become possible for an administrator to appear to have been appointed, only for the validity of the appointment to be questioned subsequently on grounds of procedural irregularity. Since the introduction of the abovementioned reforms to the administration procedure in September 2003, there have been a number of cases which have considered this issue, with a plethora of decisions between 2011 and 2012. A significant number of these focused on the requirement of the company or its directors to give notice of intention to appoint administrators to persons detailed in Rule 2.20(2) of the Rules and the associated effect of failing to give such notice.[9] These cases have failed to reach a consensus of the impact of such failure, leaving practitioners with a great deal of uncertainty.

4 Although the matter appears to have been resolved at first instance, in line with the judgment of HHJ Purle in *Re BXL Services*,[10] the current denouement lacks certainty and, in the words of Mann J:

> "…[u]ntil there is a clarification in the [Insolvency R]ules or a decision of the Court of Appeal the position will remain uncertain."[11]

5 Whilst no decision has yet been referred to the appellate courts, reform is being proposed to both the Act and the Rules to address these issues.[12]

6 The purpose of this article is to consider the current technical requirements under the Act and the related Rules and the potential effects of the proposed reforms. The manner in which the courts have considered and interpreted these requirements will be reviewed and it will be suggested that the current position has come about as a result of a mis-interpretation of the underlying requirements. It will also be suggested that the proposed reforms, to both the primary and secondary legislation, may exacerbate rather than resolve the current difficulties. Hereafter, save as otherwise indicated, any reference to a paragraph will be those in Schedule B1 of the Act and any reference to a rule will be those in the Rules.

<https://www.gov.uk/government/publications/graham-review-into-pre-pack-administration> (last viewed 20 November 2014).

[9] See, for example, *Richard John Hill and Jonathan Scott Pope v Stokes Public Limited Company* [2010] EWHC 3726 (Ch); *Minmar (929) Ltd and another v Khalatschi and another* [2011] EWHC 1159 (Ch); [2012] 1 BCLC 798; *Re Virtualpurple Professional Services Ltd* [2011] EWHC 3487 (Ch); *National Westminster Bank plc v (1) Msaada Group (a firm), (2) Gary Steven Pettit, (3) Alan Redvers Price (Joint Supervisors of Msaada Group), (4) Gordon Craig* [2011] EWHC 3423 (Ch); *Re MF Global Overseas Ltd (in administration), Re MF Global Finance Europe Ltd (in administration)* [2012] EWHC 1091 (Ch).

[10] [2012] EWHC 1877 (Ch).

[11] *Re MF Global Overseas Ltd (in administration), Re MF Global Finance Europe Ltd (in administration)* [2012] EWHC 1091 (Ch), at paragraph 12.

[12] See the Deregulation Bill 2013-14 to 2014-15 and the Insolvency Rules 2015 Consultation Draft. These are considered in detail in the paragraphs 97-119 below, which deal with attempts at reform.

A Question of Construction: An Overview of the Legislative Provisions

7 At the heart of the debate over the necessity to give notice of intention to appoint administrators to the parties in Rule 2.20(2) is the somewhat confusing inter-relationship of the provisions of paragraphs 26, 27, 28 and 30. It is important to consider these provisions to understand the differing views expressed by the courts.

The Legislative Provisions

8 Paragraph 26, entitled "Notice of intention to appoint", provides:

> " 26(1) A person who proposes to make an appointment under paragraph 22 shall give at least five business days' written notice to–
> (a) any person who is or may be entitled to appoint an administrative receiver of the company, and
> (b) any person who is or may be entitled to appoint an administrator of the company under paragraph 14.
> 26(2) A person who proposes to make an appointment under paragraph 22 shall also give such notice as may be prescribed to such other persons as may be prescribed.
> 26(3) A notice under this paragraph must–
> (a) identify the proposed administrator, and
> (b) be in the prescribed form."[13]

9 The only form prescribed for the giving of such notice is Form 2.8B, entitled "*Notice of intention to appoint an administrator by company or director(s)*".[14] The subsequent appointment by the company or directors would be made by the filing at court of Form 2.9B, entitled "*Notice of appointment of an administrator by company or director(s) (where a notice of intention to appoint has been issued)*".[15]

10 Paragraph 27 sets out the requirements for filing the notice of intention to appoint at court, including the requirement for the company representative or director to make a statutory declaration as to the company's insolvency and the ability to make the appointment.[16] A restriction on the exercise of this power is then imposed by paragraph 28, which states:

> " 28(1) An appointment may not be made under paragraph 22 unless the person who makes the appointment has complied with the requirement of paragraphs 26 and 27 and–
> (a) the period of notice specified in paragraph 26(1) has expired, or

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[13] Paragraph 26, Schedule B1, Insolvency Act 1986.
[14] Schedule 4, Insolvency Rules 1986. Form available at: <www.insolvency.gov.uk/pdfs/forms/2-8b.pdf> (last viewed 30 November 2014).
[15] Idem. Form available at: <www.insolvency.gov.uk/pdfs/forms/2-9b.pdf> (last viewed 30 November 2014).
[16] Paragraph 27, Schedule B1, Insolvency Act 1986.

> (b) each person to whom notice has been given under paragraph 26(1) has consented in writing to the making of the appointment.
>
> 28(2) An appointment may not be made under paragraph 22 after the period of ten business days beginning with the date on which the notice of intention to appoint is filed under paragraph 27(1)."[17]

11 So far, it would seem, so simple. If a company or its directors wish to appoint an administrator out-of-court, notice in a prescribed form (Form 2.8B) identifying the administrator must first be filed at court, together with certain statutory declarations, and given to any person entitled to appoint either an administrator pursuant to paragraph 14 or an administrative receiver (essentially the holder of a qualifying floating charge, hereafter referred to as a "QFCH") and such other persons as may be prescribed.[18] The appointment cannot be made without complying with these requirements. At least five business days' notice to QFCHs under paragraph 26(1) must be given before the appointment can be made, unless all such charge holders provide earlier consent in writing.[19] It has, until now, commonly been held that Rule 2.20(2) prescribes persons who are to be given notice pursuant to paragraph 26(2),[20] requiring:

> "2.20(2) [Copy of notice to be sent to] A copy of the notice of intention to appoint must, in addition to the persons specified in paragraph 26, be given to–
>
> (a) any enforcement officer who, to the knowledge of the person giving the notice, is charged with execution or other legal process against the company;
>
> (b) any person who, to the knowledge of the person giving the notice, has distrained against the company or its property;
>
> (c) any supervisor of a voluntary arrangement under Part I of the Act; and
>
> (d) the company, if the company is not intending to make the appointment."[21]

12 The situation is, however, slightly confused by paragraph 30, which adds:

> "30 In a case in which no person is entitled to notice of intention to appoint under paragraph 26(1) (and paragraph 28 therefore does not apply)–

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[17] Ibid., paragraph 28.

[18] Ibid., paragraphs 26-27.

[19] Ibid., paragraph 28.

[20] See, for example, *Richard John Hill and Jonathan Scott Pope v Stokes Public Limited Company* [2010] EWHC 3726 (Ch), at paragraph 41; *Minmar (929) Ltd and another v Khalatschi and another* [2011] EWHC 1159 (Ch); [2012] 1 BCLC 798, at paragraph 57; *Re Virtualpurple Professional Services Ltd* [2011] EWHC 3487 (Ch), at paragraph 6; *National Westminster Bank plc v (1) Msaada Group (a firm)* [2011] EWHC 3423 (Ch), at paragraphs 39 and 46.

[21] Rule 2.20(2), Insolvency Rules 1986. The common law right to distrain for arrears of rent was abolished and replaced with a process known as commercial rent arrears recovery ("CRAR") by sections 71-72, the Tribunals, Courts and Enforcement Act 2007 (2007 c.15), which came into force on 6 April 2014. As a consequence of the insertion by paragraph 85 of Schedule 13 of that Act of a definition of "distress" in section 436, Insolvency Act 1986, reference in the Rules to levying distress, seizing goods and related expressions shall be construed in accordance with the procedures in Schedule 12, Tribunals, Courts and Enforcement Act 2007 (i.e. CRAR). For more detail, see I. Fletcher, "Abolition of the Remedy of Distress - At last!" (2014) 27(8) *Insolvency Intelligence* 127.

(a) the statutory declaration accompanying the notice of appointment must include the statements and information required under paragraph 27(2), and
(b) paragraph 29(2)(c) shall not apply."[22]

13 It would therefore appear that if there is no QFCH to whom notice need be given under paragraph 26(1), there is no requirement to give any notice of the intention to appoint administrators, as the restrictions on making the appointment in paragraph 28 are dis-applied.[23] The relevant statements as to the company's solvency and ability to make the appointment are made instead in the Form 2.10B, entitled "*Notice of appointment of an administrator by company or director(s) (where a notice of intention to appoint has not been issued)*",[24] which alone is used to effect the appointment, rather than the two-stage process involving Forms 2.8B and 2.9B referred to above.

14 Whilst this may appear sensible at first glance, the wording of paragraph 30 overlooks the possibility of notice being required to be given to further parties as may be prescribed under paragraph 26(2). This disconnect has been the source of much of the judicial debate and, importantly, contrasting judgments as to the necessity to give notice of a proposed appointment to the persons listed in Rule 2.20(2), and the consequences of failing to do so.

Significance of the Judicial Debate

15 This debate is of upmost importance to insolvency practitioners. On the one hand, failure to give notice to the persons in Rule 2.20(2) could be viewed as a procedural defect. In such a case, the insolvency practitioner may be protected by the Act and the Rules. Rule 7.55 provides that any formal defect or irregularity shall not invalidate proceedings, unless the court considers that:

"…substantial injustice has been caused by the defect or irregularity…"

that cannot be remedied by any order it could make.[25] Furthermore, under paragraph 104 any act of the administrator will be valid in spite of any defect in the appointment.[26]

16 In the alternative, failure to give such notice could be deemed to invalidate the purported appointment. If there is no appointment, then the provisions of Rule 7.55 and paragraph 104 do not come into play. The insolvency practitioner, who may have exercised the powers believed to be held under Schedule 1 of the Act, could

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[22] Paragraph 30, Schedule B1, Insolvency Act 1986.
[23] Idem.
[24] Ibid., paragraph 30(a) and Schedule 4, Insolvency Rules 1986. Form available at: <www.insolvency.gov.uk/pdfs/forms/2-10b.pdf> (last viewed 30 November 2014).
[25] Rule 7.55, Insolvency Rules 1986.
[26] Paragraph 104, Schedule B1, Insolvency Act 1986.

therefore find themselves personally liable for acts carried out in pursuance of their purported appointment, such as wrongful interference with goods.[27] Whilst the insolvency practitioner could notionally rely on the indemnity from his appointor pursuant to paragraph 34,[28] this is likely to be of little benefit when given by an insolvent company or its directors.

17 It is, therefore, crucially important to understand the nature and the extent of the requirement for directors to give notice of intention to appoint administrators to the persons set out in Rule 2.20(2).

The Judicial Interpretation of Rule 2.20(2) and Paragraph 26(2)

18 The requirements of paragraph 26 and Rule 2.20(2) have received considerable attention in the courts of first instance, with a variety of decisions reached. Four cases in particular, *Hill v Stokes*,[29] *Minmar (929) Ltd v Khalatschi* ("*Minmar*"), [30] *Re Virtualpurple Professional Services Ltd* ("*Virtualpurple*")[31] and *National Westminster Bank plc v Msaada Group and others* ("*Msaada*"),[32] have had a profound impact on the insolvency profession. These decisions need to be reviewed to understand the current approach of the judiciary to the requirements for a company or its directors validly to give notice of their intention to appoint administrators.

The First Decision: Hill v Stokes

19 The first reported case to consider the requirements of service on the parties listed in Rule 2.20(2) and the effect of non-compliance was *Hill v Stokes*, in November 2010. The case concerned the appointment of administrators by the company's directors pursuant to paragraph 22. Notice of the intention to appoint administrators was served on the company's QFCH and on the company itself. However, following the appointment it became apparent that various landlords of the company, that had distrained for arrears of rent, had not been given notice of the intended appointment pursuant to Rule 2.20(2)(b). It was apparent that the directors had been aware of the distraint,[33] so the question arose as to the consequence of failing to give notice.

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[27] See, for example, the Torts (Interference with Goods) Act 1977 (1977 c.32).
[28] Paragraph 34, Schedule B1, Insolvency Act 1986.
[29] *Richard John Hill and Jonathan Scott Pope v Stokes Public Limited Company* [2010] EWHC 3726 (Ch).
[30] *Minmar (929) Ltd and another v Khalatschi and another* [2011] EWHC 1159; (Ch) [2012] 1 BCLC 798.
[31] [2011] EWHC 3487 (Ch).
[32] *National Westminster Bank plc v (1) Msaada Group (a firm), (2) Gary Steven Pettit, (3) Alan Redvers Price (Joint Supervisors of Msaada Group), (4) Gordon Craig* [2011] EWHC 3423 (Ch).
[33] *Richard John Hill and Jonathan Scott Pope v Stokes Public Limited Company* [2010] EWHC 3726 (Ch), at paragraph 15.

20 In order to understand the consequences of the directors' omission, HHJ McCahill undertook a detailed analysis of the provisions of Schedule B1 of the Act and the Rules. Rejecting the suggestion that Rule 2.20(2) did not prescribe persons for the purpose of paragraph 26(2),[34] the issue appeared to hinge on the construction of paragraph 28. HHJ McCahill came to the conclusion that the first reference therein to paragraph 26 should in fact be to paragraph 26(1), specifically the requirement to give notice to any QFCH.[35] On this basis, it was not mandatory to serve notice of an intended appointment on those parties stipulated in Rule 2.20(2), as such parties were not prescribed by paragraph 26(1). This conclusion was justified on six grounds:

1. No minimum notice period for such persons is provided, suggesting they are only given notice for information purposes;[36]
2. The obligations under Rule 2.20(2) are not absolute, arising only where the company or directors have knowledge of the existence of the specified persons;[37]
3. Only a copy of the notice of intention is required to be given under Rule 2.20(2), and the prescribed Form 2.8B makes no provision for detailing such persons;[38]
4. The effect of non-service on the persons detailed in Rule 2.20(2) is not readily apparent from the Rules;[39]
5. Paragraph 30 suggests that no notice need be given if there is no QFCH to be given notice pursuant to paragraph 26(1);[40]
6. Only the consent of QFCHs is material for the purposes of making a subsequent appointment.[41]

21 It was therefore held that failure to give notice to a distraining landlord did not render the appointment of administrators pursuant to paragraph 22 invalid on a proper construction of the requirements of paragraph 28. In any event, it was held not to be a mandatory requirement to give notice to the persons set out in Rule 2.20(2), thus non-compliance would not be fatal to the appointment.

An Alternative View: Minmar (929) Ltd v Khalatschi

22 A very different decision was reached by Morritt C less than six months later, in *Minmar*. A director of the company was seeking to challenge the appointment of administrators by his fellow directors on a number of grounds, including failure to give notice of intention to the company pursuant to Rule 2.20(2)(d).[42] In contrast to *Hill v Stokes*, there was no QFCH entitled to notice pursuant to paragraph 26(1).

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[34] Ibid., at paragraph 41.
[35] Ibid., at paragraph 48.
[36] Ibid., at paragraphs 50-51.
[37] Ibid., at paragraph 52.
[38] Ibid., at paragraphs 53-57.
[39] Ibid., at paragraph 58.
[40] Ibid., at paragraphs 59-60.
[41] Ibid., at paragraphs 61-67.
[42] *Minmar (929) Ltd and another v Khalatschi and another* [2011] EWHC 1159 (Ch); [2012] 1 BCLC 798, at paragraph 25.

23 Immediately prior to the appointment, three non-human directors were appointed to the company, with one of the two pre-existing directors suspended on grounds of gross misconduct. A directors' meeting was called, though notice was not given to the remaining historic director. The meeting was purported to be attended by the three new directors, although in fact only one of these corporate directors was represented, the representative declaring it quorate and resolving to appoint administrators.

24 Morritt C determined the appointment to be invalid, as the paragraph 22(2) power to appoint had not been exercised by the majority of directors in accordance with paragraph 105, which did not dispense with the normal rules of internal management.[43] On the facts, it was clear that the existing directors had been kept in the dark over the proposed appointment intentionally, and as a result the company's internal processes, as stipulated by its Articles of Association, had not been followed.

25 Had the Chancellor concluded his judgment here, the case would likely have been of little significance to the majority of practitioners. However, Morritt C went on to consider the requirements of paragraph 26, despite the fact that:

> "…the point of law … does not arise, but in case this case goes further."[44]

26 The court was not referred to the recent judgment of HHJ McCahill in *Hill v Stokes*, thus the issue was considered afresh. The Chancellor held that the persons specified in Rule 2.20(2) were concerned with a proposed appointment whether or not there was any QFCH entitled to appoint an administrator or administrative receiver.[45] It was held to be a standalone requirement to give such persons notice, which in the absence of any specified notice period:

> "presumably … must be a reasonable period…"

though no guidance was given as to what this would constitute.[46] Morritt C chose to ignore paragraph 30, and instead:

> "follow the clear words of paras 26 and 28".[47]

27 As such, failure to give notice to the company itself, pursuant to Rule 2.20(2)(d), would invalidate the appointment of administrators.

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[43] Ibid., at paragraphs 34-52.
[44] Ibid., at paragraph 53.
[45] Ibid., at paragraph 61.
[46] Ibid., at paragraph 63.
[47] Ibid., at paragraph 66.

28 The *obiter* comments of the Chancellor on the import of Rule 2.20(2) sent hares running throughout the insolvency world.[48] Not only was such importance attached to the giving of notice to these parties that not to do so would invalidate any subsequent appointment, but it was also considered necessary to give notice to these parties where there was no QFCH entitled to notice pursuant to paragraph 26(1). This opened a Pandora's Box and led to a number of cases flooding the courts in the following months.[49]

One Day. Two Cases. More Confusion: The Decisions in Virtualpurple and Msaada

29 In the number of cases that followed the Chancellor's judgment in *Minmar*, the judiciary appeared inclined to adopt a purposive approach and distinguish that case, so as to avoid numerous appointments being declared invalid.[50] It appeared that a degree of certainty had returned post *Minmar*. This was not to last. The relative calm was once more upset by the delivery on 21 December 2011 of two conflicting first instance judgments as to the entitlement of the parties in Rule 2.20(2) to notice in the absence of a QFCH under paragraph 26(1). The insolvency profession was once more in limbo following the decisions handed down by Norris J in *Virtualpurple* and by Warren J in *Msaada*.

The Decision in Virtualpurple

30 The sole director of the company, which had no QFCHs, resolved in a formally minuted meeting to appoint administrators pursuant to paragraph 22(2), having taken professional advice. This was achieved by filing Form 2.10B at court, with no notice of intention to appoint served on any of the parties in Rule 2.20(2). Norris J held, that on proper construction of the provisions of Schedule B1, there was no need to give notice of the intended appointment to the company.[51] He went on to hold that, even if notice was required, failure to serve it on the company would not invalidate the administrators' appointments.[52]

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[48] See, for example, D. Gray, "Directors' Appointment of Administrators — to serve or not to serve?" (2011) 4 *Corporate Rescue and Insolvency* 135 and M. Weaver, "Administration – The Plot thickens" (2012) 1 *Corporate Rescue and Insolvency* 7. In the latter, the decision is described as having "produced sleepless nights for directors, administrators and their lawyers alike."

[49] See, for example, *Re Derfshaw Ltd and others* [2011] EWHC 1565 (Ch); *Re Care Matters Partnership Ltd* [2011] EWHC 2543 (Ch); [2012] 2 BCLC 311; *Re Frontsouth (Witham) Ltd, Re Bridge Hospital (Witham) Ltd* [2011] EWHC 1668 (Ch); [2012] 1 BCLC 818; *Re Assured Logistics Solutions Ltd; Re Taurus Bathrooms Limited* [2011] EWHC 3029 (Ch); [2012] BCC 541; *Adjei and others v Law For All* [2011] EWHC 2672 (Ch); *Re Bezier Acquisitions Ltd* [2011] EWHC 3299 (Ch); [2012] 2 BCLC 322.

[50] See, for example, the decision in *Re Bezier Acquisitions Ltd* [2011] EWHC 3299 (Ch); [2012] 2 BCLC 322.

[51] *Re Virtualpurple Professional Services Ltd* [2011] EWHC 3487 (Ch), at paragraph 23.

[52] Ibid., at paragraph 26.

31 In considering the requirements that directors need to comply with when there is no QFCH, Norris J did not find the provisions of Schedule B1 to be clear, as the Chancellor had in following:

> "…the clear words of paras 26 and 28…"[53]

but rather read them:

> "…consistently with other provisions and with an eye on the purpose for which I think they were enacted."[54]

32 Following the lead of HHJ McCahill in *Hill v Stokes*, Norris J interpreted the reference to paragraph 26 within paragraph 28 as being a reference to paragraph 26(1). He did this in the context of a comparative analysis of the three methods of appointing an administrator pursuant to Schedule B1 and setting out eight supporting reasons: [55]

1. A strict construction of paragraph 30 suggests the draftsman envisaged two scenarios: one where notice of intention be given to a QFCH, and another where no such notice is required.
2. That no persons are specified in paragraph 26, other than in paragraph 26(1), suggests that the reference to paragraph 26 in Rule 2.20(2) is in fact to paragraph 26(1);
3. The prescribed form 2.8B is only suitable for giving notice to a QFCH;
4. Rule 2.20(2) only requires a "copy" of the notice to be given to those parties, in addition to the persons specified in paragraph 26;
5. If the directors are always required to give notice to the company, then the Form 2.10B (entitled "*Notice of appointment of an administrator by company or director(s) (where a notice of intention to appoint has not been issued)*") is wrongly headed, as it applies where no notice of intention is given;
6. The statutory declaration in the Form 2.10B is ineffective for a director's appointment where notice of intention to appoint needs to have been given;
7. The Form 2.8B cannot sensibly be completed other than if addressed to QFCHs; and
8. The decision in *Minmar* ignores the significance of the interim moratorium and why notice of it needs to be given to the parties listed in Rule 2.20(2).

33 Norris J went on to distinguish the decision in *Minmar*, in that there was no evidence in the instant case of a division between directors and shareholders nor was there any doubt as to the authority of the directors to act on behalf of the company.[56]

34 Reading the judgment handed down by Norris J in *Virtualpurple*, many practitioners would no doubt have breathed a sigh of relief at the apparent

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[53] *Minmar (929) Ltd and another v Khalatschi and another* [2011] EWHC 1159 (Ch); [2012] 1 BCLC 798, at paragraph 66.
[54] *Re Virtualpurple Professional Services Ltd* [2011] EWHC 3487 (Ch), at paragraph 21.
[55] Ibid., at paragraphs 11-22. The three modes of appointment being: by court order pursuant to paragraph 12, Schedule B1, Insolvency Act 1986; out-of-court by a qualifying floating charge holder pursuant to paragraph 14; and out-of-court by the company or its directors pursuant to paragraph 22.
[56] Ibid., at paragraph 27.

continuation of purposive judicial interpretation. This sense of calm would not have lasted long, however, once the impact of Warren J's verdict in *Msaada* was digested.

The Decision in Msaada

35 Although concerning a very different set of facts, *Msaada* touched upon the issues at the heart of the debate following the decision of the Chancellor in *Minmar*. The case involved an insolvent partnership which appointed administrators out-of-court pursuant to paragraph 22 (as it applies to partnerships under the Insolvent Partnerships Order 1994[57] ("IPO")). For partnerships, the provisions of paragraph 14 are only available to agricultural floating charge holders,[58] of which there were none in this case. Accordingly, the partners did not give notice of their intention to appoint administrators to any parties, as they did not consider the amended provisions of paragraph 26 to be engaged under paragraph 30.[59]

36 The Rules apply equally to insolvent partnerships, with:

> "…such modifications as the context requires for the purpose of giving effect to the provisions of the [Insolvency] Act [1986]."[60]

37 At the time of the appointment, the partnership was subject to a Partnership Voluntary Arrangement ("PVA") pursuant to the IPO.[61] The partners' appointment of administrators was challenged by the partnership's secured creditor, for want of notice of the intention to appoint being given to the supervisors of the PVA pursuant to Rule 2.20(2)(c), as amended.[62] The secured creditor was unhappy with the partnership's choice of administrator, and wanted its own, more experienced, nominee appointed by the court. Warren J had to decide, therefore, whether the supervisors of the PVA should have been given notice of the proposed appointment and, if so, the impact of the failure to do so.[63]

38 The court concluded that, even in the absence of a QFCH, notice should have been given to the PVA supervisors, with failure to do so invalidating the appointment. Rather than making a retrospective appointment of the partners' chosen administrator, the secured creditor's nominee was appointed

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[57] The Insolvent Partnerships Order 1994 (SI 1994/2421) as amended by the Insolvent Partnerships (Amendment) Order 2005 (SI 2005/1516).
[58] Ibid., paragraph 7, Schedule 2.
[59] Ibid., paragraph 11, Schedule 2.
[60] Ibid., paragraph 18 and Schedule 10.
[61] Ibid., paragraph 4.
[62] Rule 2.20(2)(c), Insolvency Rules 1986, as amended by paragraph 18 and Schedule 10, The Insolvent Partnerships Order 1994.
[63] *National Westminster Bank plc v Msaada Group (a firm) & Ors* [2011] EWHC 3423 (Ch), at paragraph 17.

prospectively.[64] In reaching his conclusion, Warren J considered the judgments of HHJ McCahill in *Hill v Stokes* and Morritt C in *Minmar*, finding:

> "…[i]n concurrence with the reasoning of the Chancellor, it is then right to follow the clear words of paragraphs 26 and 28 so that the latter is not to be read down as referring only to paragraph 26(1)."[65]

39 The judgment was therefore at odds with that of Norris J in *Virtualpurple*.

40 Somewhat strangely, considerable weight appears to be given to the views of the secured creditor. Had this case concerned a company, it is inconceivable that the secured creditor in question would not have taken a floating charge over the borrower's assets, such was the extent and importance of its funding. However, as it was lending to a partnership, this was not possible. Perhaps as a consequence, Warren J appears to elevate the status of the fixed-charge creditor to that of a floating charge holder. In part of his judgment, Warren J holds that notice of the intended appointment should have been given to the PVA supervisors, as they may have informed the secured creditors, who in turn could have made an administration application before the partners completed their appointment.[66]

41 Whilst this turn of events may well have occurred had the secured creditor received such indirect notice, the rationale goes beyond the provisions of Rule 2.20(2). The secured lender would have been interested in the partnership's choice of administrators irrespective of whether it was subject to a PVA, as any appointment would have a bearing on realisations under its security. However, had there not been a PVA, the secured lender would not have received the notice alluded to by Warren J. The secured creditor's position should not change because of the PVA, as this is not provided for in the Act or the Rules. The decision, in at least part, therefore appears to be founded upon uncertain legal grounds.

The Fallout from Virtualpurple and Msaada

42 The conflicting judgments of Norris J and Warren J caused much uncertainty and evermore caution amongst insolvency practitioners. With no clear guidance, there were two apparent choices when making an administration appointment: firstly, to serve notice of intention to appoint in Form 2.8B on any parties detailed in Rule 2.20(2), even in the absence of a QFCH; or secondly, to seek court appointment. The first approach was not without risk, given the decision of Hart J in *Re G-Tech Construction Ltd*,[67] whilst the latter was deemed by Mann J to be

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[64] Ibid., at paragraphs 61 and 97.
[65] Ibid., at paragraph 62.
[66] Ibid., at paragraph 53.
[67] [2007] BPIR 1275 (Ch D). Hart J held that using the incorrect prescribed form led to an invalid appointment. Mann J's judgment in *Re MF Global Overseas Ltd (in administration), Re MF Global Finance Europe Ltd (in administration)* [2012] EWHC 1091 (Ch) did offer some respite from this.

"very unfortunate",[68] given the purpose of the Enterprise Act 2002 reforms to make administration more accessible and streamlined.[69]

43 A semblance of order was restored following the judgment in *Re BXL Services*[70] in July 2012. HHJ Purle found himself bound, pursuant to the *Colchester Estates*[71] principle, by the recent decision of Arnold J in *Re Ceart Risk Services*.[72] Accordingly, HHJ Purle held that:

> "… it seems to me that I should regard the law as now settled at first instance: the failure to give notice of an intended appointment to one of the parties prescribed under paragraph 26(2) of Schedule B1 does not invalidate the appointment, even assuming that such notice is required."[73]

The Judicial Divide: Hill v Stokes and Virtualpurple versus Minmar and Msaada

44 The four key judgments considered above differ on the entitlement of the parties in Rule 2.20(2) to notice in the absence of a QFCH under paragraph 26(1). Essentially, HHJ McCahill in *Hill v Stokes* and Norris J in *Virtualpurple* held that it is only necessary to give notice to these additionally prescribed persons if there is a QFCH being given notice under paragraph 26(1). This, it was held, is supported by the wording of paragraphs 28(1)(a)-(b) and 30, and that the reference in the opening line of paragraph 28 to "paragraphs 26 and 27", should in fact be read as to "paragraphs 26(1) and 27".[74]

45 Quite a different position is reached by Morritt C in *Minmar* and Warren J *Msaada*, both following the:

> "…clear words of paragraphs 26 and 28 [Schedule B1]…"

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[68] *Re MF Global Overseas Ltd (in administration), Re MF Global Finance Europe Ltd (in administration)* [2012] EWHC 1091 (Ch), at paragraph 16.
[69] HC Deb 10 April 2002, vol 383, cols 44-115. See the comments of the Parliamentary Under-Secretary of State for Trade and Industry, Miss Melanie Johnson, at col 114 where she says, *inter alia*, "I reassure the House that the intention in company insolvencies is to disengage from active involvement of the courts, except in cases where there is dispute or complexity."
[70] [2012] EWHC 1877 (Ch).
[71] *Colchester Estates (Cardiff) v Carlton Industries plc* [1984] 2 All ER 601.
[72] *Re Ceart Risk Services Ltd; Bootes and others v Ceart Risk Services Ltd* [2012] EWHC 1178 (Ch).
[73] *Re BXL Services* [2012] EWHC 1877 (Ch), at paragraphs 11 and 13.
[74] *Richard John Hill and Jonathan Scott Pope v Stokes Public Limited Company* [2010] EWHC 3726 (Ch), at paragraph 48; *Re Virtualpurple Professional Services Ltd* [2011] EWHC 3487 (Ch), at paragraph 22.

in holding that the parties set out in Rule 2.20(2) are entitled to notice of the company or directors' intention to appoint administrators, irrespective of whether there is a QFCH to be given notice under paragraph 26(1).[75]

46 In order to resolve the issue as to whether and when the parties set out in Rule 2.20(2) need to be given notice of the intention to appoint administrators, it is necessary to consider the conflict between the judgments on either side of the debate. Both sides make valid points, but the decisions all leave a number of key issues unanswered. A simpler solution, however, appears to have been dismissed, with no clear rationale.

Problems with the Judicial Interpretation

47 The judgment of HHJ Purle in *Re BXL Services* has been widely welcomed throughout the insolvency profession, seen by many as drawing a line under the hitherto thorny issue of service pursuant to Rule 2.20(2), and in particular service on the company.[76] Whilst the decision must be welcomed in the short term for providing much-needed relief in the out-of-court appointment process, it is not the panacea that is needed. The line of judgments from *Hill v Stokes* through *Minmar* to *Re BXL Services* by and large considered two key questions: firstly, to whom must notice of the directors' intention to appoint administrators be given; and secondly, what is the impact of not giving notice to such a person. Only the second of these matters has been settled at first instance. Whilst it is now clear that a defect in the giving of notice of intention of an appointment can be rectified without recourse to the limited remedy of a "G-Tech Order",[77] it has yet to be resolved when Rule 2.20(2) requires notice to be given.[78] Doubt therefore remains as to the operation of Rule 2.20(2). Does it apply independently in the absence of a QFCH, or is it dependent on a notice of intention to appoint having been given under paragraph 26(1)?

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[75] *Minmar (929) Ltd and another v Khalatschi and another* [2011] EWHC 1159 (Ch); [2012] 1 BCLC 798, at paragraphs 61-66; *National Westminster Bank plc v (1) Msaada Group (a firm)* [2011] EWHC 3423 (Ch), at paragraph 62.

[76] See, for example, <www.linklaters.com/Publications/Director-appointments-of-administrators-return-to-pragmatism/Pages/index.aspx> and <www.kennedys-law.com/article/outofcourtadministrationappointments> (both last viewed 30 November 2014).

[77] So called following the judgment of Hart J in *Re G-Tech Construction Ltd* [2007] BPIR 1275 (Ch D). The order could only be made retrospectively for up to 364 days, to avoid its automatic expiry for effluxion of time. Following the decision of Norris J in *Re Care Matters Partnership Ltd* [2011] EWHC 2543 (Ch), such an order could only be made if the purpose of administration was still achievable at the date of the subsequent application.

[78] Failure to give notice of intention to appoint could be a remediable defect capable of curing by the court pursuant to rule 7.55 of the Insolvency Rules 1986, whilst any acts of the administrators could be validated by paragraph 104, Schedule B1, Insolvency Act 1986.

The True Nature of Rule 2.20(2) of the Insolvency Rules 1986

48 In his lengthy and detailed judgment in *Msaada*, Warren J makes a valid critique of HHJ McCahill's interpretation in *Hill v Stokes* of paragraph 28, where he read reference to paragraph 26 as being to paragraph 26(1).[79] To do as HHJ McCahill suggests would make it:

> "…impossible, without primary legislation, ever to prescribe a person or notice under paragraph 26(2) having the consequence that non-compliance would lead to invalidity of any appointment."[80]

49 HHJ McCahill's suggestion essentially devoids paragraph 26(2) of any purpose. Consider, for example, if secondary legislation prescribed that, pursuant to paragraph 26(2), all fixed charge holders be given five business days' notice of the intention of the company or directors to appoint administrators out-of-court. On HHJ McCahill's construction, failure to give this notice would not invalidate the subsequent appointment, as it would if notice were not given to a QFCH. Whilst there is no doubt an argument that there may be drafting errors in Schedule B1 given the manner in which it was rushed through Parliament,[81] it is highly unlikely that Parliament would have intended to disable itself in such a way. This is an entirely appropriate and valid point by Warren J, which points to a solution, apparently readily dismissed by all sides.

50 Paragraph 26(2) provides that the company or directors making an out-of-court administration appointment:

> "…shall also give such notice as may be prescribed to such other persons as may be prescribed."[82]

51 Adopting the approach of the Chancellor and Warren J, and looking at the clear words of the statute, this is a conjunctive requirement: the additional prescribed persons must be given notice in a form prescribed for that purpose. Arguably, it would not be possible to stipulate a person for the purpose of paragraph 26(2), without also stipulating the form of such notice. Therefore, for Rule 2.20(2) to

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[79] *Richard John Hill and Jonathan Scott Pope v Stokes Public Limited Company* [2010] EWHC 3726 (Ch), at paragraphs 35-36.
[80] *National Westminster Bank plc v Msaada Group (a firm) & Ors* [2011] EWHC 3423 (Ch), at paragraph 33.
[81] There was no provision for an out-of-court appointment process in the White Paper *Insolvency – A Second Chance* 2001 (Cm 5234) and it appears that a number of MPs were not aware of its introduction at the second reading of the Enterprise Bill, See, for example, HC Deb 10 April 2002 vol 383 cols 44-115 and the comments of Mr John Whittingdale at col 58, Mr David Ruffley at col 82 and Mr Jonathan Djanogly at col 101. There was also concern at the speed at which the Bill was been forced through, as seen in the complaints of Mr John Whittingdale at col 53 that there had been a "lack of real consultation" and "little opportunity for detailed scrutiny and debate" of such a complex Bill.
[82] Paragraph 26(2), Schedule B1, Insolvency Act 1986.

prescribe persons to be given notice pursuant to paragraph 26(2), there must be a related form for serving notice on them.

52 Beyond the provisions of Schedule B1, the procedural aspects of the appointment of an administrator by a company or its directors are set out in Chapter 4 of Part 2 of the Rules. Rules 2.20-2.22 deal with notices of intention to appoint, whilst the remainder of Chapter 4, Rules 2.23-2.26, relate to the subsequent notice of appointment.[83] Rules 2.21 and 2.22 cover the timing of the statutory declaration and evidence of authority.[84] It is therefore important to consider the provisions of Rule 2.20 as a whole, which provide:

> "2.20 Notice of intention to appoint
> 2.20(1) [Form of notice] The notice of intention to appoint an administrator for the purposes of paragraph 26 shall be in Form 2.8B.
> 2.20(2) [Copy of notice to be sent to] A copy of the notice of intention to appoint must, in addition to the persons specified in paragraph 26, be given to–
> (a) any enforcement officer who, to the knowledge of the person giving the notice, is charged with execution or other legal process against the company;
> (b) any person who, to the knowledge of the person giving the notice, has distrained against the company or its property;
> (c) any supervisor of a voluntary arrangement under Part I of the Act; and
> (d) the company, if the company is not intending to make the appointment.
> 2.20(3) [Application of r.2.8(2)-(5) to notice] The provisions of Rule 2.8(2) to 2.8(5) shall apply to the sending or giving of notice under this Rule as they apply to the manner in which service of an administration application is effected under that Rule."[85]

53 Form 2.8B, entitled "*Notice of intention to appoint an administrator by company or director(s)*", is the only form prescribed by the Rules for the giving of notice of intention to appoint administrators. Thus, if Rule 2.20(2) is to be prescribing for the purposes of paragraph 26(2), then Form 2.8B must be suitable for serving on these parties. It is, however, readily apparent on viewing Form 2.8B, that this is not designed for the giving of notice to any person other than a QFCH pursuant to paragraph 26(1) Schedule B1. The second paragraph of the form states:

> "This notice is being given to the following person(s), being person(s) who is / are or may be entitled to appoint an administrative receiver of the company or an administrator of the company under paragraph 14 of Schedule B1 to the Insolvency Act 1986" [86]

54 This is the only part of Form 2.8B in which it is possible to set out the details of any party on whom the form is to be served. Based on the contents of the form, it cannot be used to give notice of intention to appoint an administrator unless there

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[83] Rules 2.20-2.26, Insolvency Rules 1986.
[84] Ibid., rules 2.21-2.22.
[85] Ibid., rule 2.20(2).
[86] Ibid., Schedule 4, available at: <www.insolvency.gov.uk/pdfs/forms/2-8b.pdf> (last viewed 30 November 2014).

exists a QFCH. Even then, it would not be possible to set out the details of any of the persons in Rule 2.20(2) within the Form 2.8B. There are only two other forms prescribed for appointments made pursuant to paragraph 22; Form 2.9B (entitled "*Notice of appointment of an administrator by company or director(s) (where a notice of intention to appoint has been issued)*") and Form 2.10B (entitled "*Notice of appointment of an administrator by company or director(s) (where a notice of intention to appoint has not been issued)*").[87] These are both for the actual appointment of administrators by a company or its directors, and are clearly not suitable for giving notice of the intention to appoint, a fact acknowledged by the Chancellor in *Minmar*, who was:

> "…unable to reconcile the inconsistency."[88]

55 Evaluation of the various prescribed forms makes it clear that none is suitable for giving of notice to the parties in Rule 2.20(2). Warren J was of the view that:

> "…the prescribed Forms for companies, and indeed the terms of Rule 2.20(2) also, are not relevant to the construction of Schedule B1."[89]

56 In making this statement, Warren J was referring to HHJ McCahill's interpretation of paragraph 28, and no doubt he is correct that secondary legislation should not be used to rewrite primary legislation. However, it cannot be doubted that by reviewing the prescribed forms alongside the Rules, we can ascertain whether the basic requirements of the statute have been met in order for Rule 2.20(2) to be considered prescribing.

57 It is notable that Rule 2.20(1), which prescribes the only form to be used to notice of intention to appoint, was introduced contemporaneously with Rule 2.20(2),[90] and neither has been amended since. Had the Secretary of State intended Rule 2.20(2) to prescribe persons for the purpose of paragraph 26(2), one would have imagined that care would have been taken to ensure the prescribed form being introduced was appropriate for the purpose, or that a further form would have been introduced then or subsequently. That there is no appropriate prescribed form for giving notice to the persons in Rule 2.20(2) further suggests that these are not persons prescribed for the purpose of paragraph 26(2). Rather, these persons should receive a copy of the notice being given to any QFCH, as per the clear words of Rule 2.20(2). This will be explored further below.

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[87] Ibid., Schedule 4, available at: <www.insolvency.gov.uk/pdfs/forms/2-9b.pdf> and <www.insolvency.gov.uk/pdfs/forms/2-10b.pdf> (both last viewed 30 November 2014).
[88] *Minmar (929) Ltd and another v Khalatschi and another* [2011] EWHC 1159 (Ch); [2012] 1 BCLC 798, at paragraphs 65-66.
[89] *National Westminster Bank plc v (1) Msaada Group (a firm)* [2011] EWHC 3423 (Ch), at paragraph 38.
[90] Insolvency (Amendment) Rules 2003 (SI 2003/1730).

58 This view is further supported by consideration of Form 2.10B. Introduced by Rule 2.23(1) at the same time as Form 2.8B, Form 2.10B is entitled "*Notice of appointment of an administrator by company or director(s) (where a notice of intention to appoint has not been issued)*", and makes provision for administrators to be appointed by both company and directors, without any prior notice of the intention to appoint being given. As was rightly pointed out by Norris J in *Virtualpurple*, if the directors are bound to give the company notice of their intention to appoint administrators pursuant to Rule 2.20(2)(d) even in the absence of any QFCH (or indeed any other person prescribed for the purpose of paragraph 26(2)), it would never be possible for a company director to use Form 2.10B.[91] It is apparent throughout this form that it is intended to be used by both company and directors. Such a form would not be suitable, had the draftsman of the Rules intended directors to give notice of intention to appoint to the company in all situations.

Judicial Comity and the Acceptance of Rule 2.20(2) as a Prescribing Provision

59 Interestingly, in dismissing HHJ McCahill's rationale in *Hill v Stokes*, Warren J states that:

> "…[t]he Form itself therefore provides no basis for saying that the persons specified in Rule 2.20(2) are not the persons who are prescribed in those circumstances for the purposes of paragraph 26(2)."[92]

60 Whilst this is arguably incorrect, HHJ McCahill does not make such a suggestion anywhere in his judgment; in fact he quite clearly dismisses the notion as raised by the directors' solicitors.[93] It is therefore worthwhile considering why, in light of the strong counter-indications set out above, the courts have seemingly accepted that Rule 2.20(2) is a prescribing provision for the purpose of paragraph 26(2).

61 In his appraisal of the provisions of Schedule B1 and the Rules in *Hill v Stokes*, HHJ McCahill opines that:

> "…if persons have been prescribed for the purposes of paragraph 26(2) of schedule B1, one finds them nowhere else than in paragraph 2.20."[94]

62 Arguably this is accurate; there is no other secondary legislation presently enacted which could be considered to prescribe persons for the purpose of

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[91] *Re Virtualpurple Professional Services Ltd* [2011] EWHC 3487 (Ch), at paragraph 22(f).
[92] *National Westminster Bank plc v Msaada Group (a firm) & Ors* [2011] EWHC 3423 (Ch), at paragraph 39.
[93] *Richard John Hill and Jonathan Scott Pope v Stokes Public Limited Company* [2010] EWHC 3726 (Ch), at paragraphs 40-43.
[94] Ibid., at paragraph 29.

paragraph 26(2). This does not by itself indicate that Rule 2.20(2) fulfils this purpose. Ultimately, Rule 2.20(2) fails to do so in the absence of a suitable prescribed form. The judgment, however, goes on to dismiss the suggestion by the directors' solicitors that:

> "…on its proper construction rule 2.20 does not purport to identify or prescribe anyone for the purposes of 26(2) in schedule B1."[95]

63 The rationale for this dismissal appears to be that:

> "…it would come as somewhat of a surprise to the learned authors of the leading textbooks…"

and that:

> "…everybody has proceeded upon the basis … that 2.20(2) is the prescribing process for paragraph 26(2) in schedule B1."[96]

64 Such dismissal lacks robustness. Perhaps the submission did not emphasise the key point, for it is the lack of appropriate prescribed form which is key, and appears from the judgment to have been overlooked. That Rule 2.20(2) does not engage paragraph 26 seems readily more plausible than the suggestion that Rule 2.20(2) also suffered from the draftsman's laxity, as reference to paragraph 26 should again be read as paragraph 26(1).[97] If one is to read the introductory words of Rule 2.20(2), the reference to "the person specified in paragraph 26" would encompass both paragraphs 26(1) and 26(2).[98] The use of the singular is not, as suggested by HHJ McCahill, indicative of the intention only to refer to paragraph 26(1), given there could be multiple QFCHs caught by this provision alone.

65 The same conclusion is reached by Morritt C in *Minmar* and Norris J in *Virtualpurple*, though again the rationale is debatable. Having set out the provisions of each of the paragraphs of Rule 2.20, the Chancellor concludes:

> "…[t]hus r 2.20(2) is the provision to which para 26(2) referred and reading the two together requires notice of an intention to appoint an administrator to be given to the company itself."[99]

66 Similarly, in *Virtualpurple*, having considered the provisions of paragraph 26 and the contents of Form 2.8B as prescribed by Rule 2.20(1), Norris J addresses the provisions of paragraph 26(2), concluding that:

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[95] Ibid., at paragraphs 40-41.
[96] Ibid., at paragraph 41.
[97] Ibid., at paragraph 42.
[98] Rule 2.20(2), Insolvency Rules 1986.
[99] *Minmar (929) Ltd and another v Khalatschi and another* [2011] EWHC 1159 (Ch); [2012] 1 BCLC 798, at paragraphs 56-57.

> "…[t]hose other persons [referred to in paragraph 26(2) Schedule B1] are set out in IR 2.20(2)."[100]

67 It is accepted that Rule 2.20(2) is a prescribing provision for paragraph 26(2) despite the acknowledgment that there is no notice period and that Form 2.8B is not suitable for giving notice to those persons.[101] As with the decision in *Hill v Stokes*, there appears to be an assumption that somebody must have been prescribed for the purpose of paragraph 26(2), and as only Rule 2.20(2) provides a possible solution, it has been readily accepted as such.

68 The suggestion that Rule 2.20(2) is not a prescribing provision is raised once again by counsel for the defence in *Msaada*, in arguing that those persons do not require service pursuant to paragraph 26(2).[102] The suggestion is once again rejected, on a number of grounds, though again the rationale appears to be questionable. Firstly, Warren J found that according to section 251 of the Act, "prescribed" means prescribed by the rules made in accordance with section 411 of the Act, being substantially the Rules, and as such:

> "…Rule 2.20(2) can therefore be seen prescribing persons and purposes for the purposes of paragraph 26."[103]

69 Undoubtedly the quoted statutory provisions make it possible for Rule 2.20(2) to prescribe persons for the purpose of paragraph 26(2), but as drafted it fails to do so, given the lack of appropriate prescribed form. Warren J goes on to suggest that:

> "…unless Rule 2.20(2) is seen as engaging paragraph 26, it is not easy to see what power there is to require service of a notice of intention on anyone."[104]

70 The argument appears to be that, if Rule 2.20(2) does not apply pursuant to paragraph 26(2), then it is of no effect generally in requiring notice to be given to those parties. It should once again be noted that Rule 2.20(2) only requires a "copy" of the notice of intention to appoint to be given to those parties,[105] which is distinguishable from a notice itself, as will be discussed below. Warren J concludes that such notice must be set forth in Form 2.8B, as prescribed by Rule 2.20(1),[106] apparently ignoring the fact that Form 2.8B is inadequate for such purpose.

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[100] *Re Virtualpurple Professional Services Ltd* [2011] EWHC 3487 (Ch), at paragraphs 4-6.
[101] Ibid., at paragraphs 6 and 23(g).
[102] *National Westminster Bank plc v Msaada Group (a firm) & Ors* [2011] EWHC 3423 (Ch), at paragraph 46.
[103] Idem.
[104] Ibid., at paragraph 47.
[105] Rule 2.20(2), Insolvency Rules 1986.
[106] *National Westminster Bank plc v Msaada Group (a firm) & Ors* [2011] EWHC 3423 (Ch), at paragraphs 48-51.

71 Whilst the courts on both sides of the divide appear routinely to have accepted that Rule 2.20(2) is a prescribing provision for paragraph 26(2), it would appear that the rationale for doing so is not clear cut, and certainly is not convincing. Paragraph 26(2) clearly states that both further person and notice may be prescribed.[107] Given that the prescribed form introduced contemporaneously with Rule 2.20(2) is not suitable for giving notice to those persons, especially where there is no QFCH pursuant to paragraph 26(1), the basic requirements of paragraph 26(2) do not appear to have been fulfilled.

Dispelling the Myth: Further Evidence that Rule 2.20(2) does not engage Paragraph 26(2)

72 Closer inspection of both the provisions of Schedule B1 and the Rules reveals further evidence that Rule 2.20(2) does not, nor was it intended to, act as a prescribing instrument pursuant to paragraph 26(2). Many of these issues have been considered by the courts, though not from the perspective of whether Rule 2.20(2) is a prescribing provision. When re-addressed from this perspective, the arguments and counter-arguments raised across the divide of opinion would appear to fall away.

Choice of Language

73 Once more following the approach of the Chancellor in *Minmar*, and concentrating on the clear words of the legislation, it is possible to distinguish the nature of service on those persons in Rule 2.20(2) from that required by paragraph 26. The Rule commences with:

> "A copy of the notice of intention to appoint must, in addition to the persons specified in paragraph 26, be given to..."[108]

74 The choice of language appears to be telling. Firstly, the Rule relates to the service of a copy notice. For a copy to exist, there must be an original notice that requires service. This would appear to be the notice generated under paragraph 26, whether it be 26(1) or 26(2), given the use of the words:

> "…in addition to those persons specified in paragraph 26."

75 Indeed, if Rule 2.20(2) was to be a prescribing provision for paragraph 26(2), this language would prove circular – the persons listed would, in effect, be in addition to themselves.

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[107] Paragraph 26(2), Schedule B1, Insolvency Act 1986.
[108] Rule 2.20(2), Insolvency Rules 1986.

76 This literal interpretation was rejected, somewhat tenuously, in *Msaada*, with Warren J contending that:

> "…what is seen as being given even to the persons specified in paragraph 26(1) is a copy of the notice…"

as:

> "…[e]ach piece of paper is both a "copy" of the notice of intention to appoint for the purposes of Rule 2.20(2) and a notice in the prescribed form for the purposes of paragraph 26(1) and (2)."[109]

77 Whilst there is arguably a certain logic to this approach – there may be many "copies" of the notice – it does not sit well within the broader context of the interaction, or lack thereof, of Rule 2.20(2) with paragraph 26(2) and the provision within the prescribed Form 2.8B. Indeed, given that the parties in Rule 2.20(2) cannot be detailed within Form 2.8B, surely they can only be given a copy of that form generated for service on the parties in paragraph 26(1). Warren J even goes on to say that:

> "…were it not for the presence of the words "in addition to…" it would be clear, in my view, that Rule 2.20(2) was prescribing the listed persons for the purposes of paragraph 26(2)."[110]

78 However, the inclusion of these words is significant, and in trying to counter their meaning Warren J apparently rewrites the Rule, reading the reference to paragraph 26 as paragraph 26(1).[111] There is no clear explanation for this approach, which is contrary to his rejection of HHJ McCahill's similar approach to paragraph 28.[112]

79 The distinct meaning of the word "copy" in Rule 2.20(2) is further illustrated when compared to the provisions for service of a court application for an appointment pursuant to paragraph 12. The parties to be notified of an administration application are set out in paragraphs 12(2)(a)-(c), with paragraph 12(2)(d) allowing for further persons to be prescribed.[113] Such additional parties are prescribed in Rule 2.6(3), which begins:

> "…[t]he application shall be served in addition to those persons referred to in paragraph 12(2)…"

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[109] *National Westminster Bank plc v Msaada Group (a firm) & Ors* [2011] EWHC 3423 (Ch), at paragraph 50.
[110] Ibid., at paragraph 51.
[111] Idem.
[112] Ibid., at paragraph 41.
[113] Paragraph 12(2), Schedule B1, Insolvency Act 1986.

going on to list various additional parties.[114] Notably, this rule does not refer to a "copy" of the application being served; a stark contrast to the language adopted in Rule 2.20(2). The adoption of the word "copy" in Rule 2.20(2) distinguishes the type of service required on those parties when compared to the parties in Rule 2.6(3), and therefore also those parties set out in paragraph 26.

80 The language of Rule 2.6(3) does present a challenge to this argument, however. The use of the words:

> "…in addition to those persons referred to in paragraph 12(2)…"

does create an air of circularity, as considered in respect of Rule 2.20(2) above, given it includes paragraph 12(2)(d), for which this rule is prescribing. This could, however, be a consequence of the number of additional sub-paragraphs in paragraph 12(2), which already prescribes three distinct groups, in contrast to paragraph 26 which only prescribes one distinct group; the QFCHs. In any event, the use of the word "copy" only in Rule 2.20(2) would appear to be of more significance, especially when considered in the context of the contents of Form 2.8B.

Purpose of Giving Notice

81 If the rationale for the giving of notice of intention to appoint an administrator is considered, there is no clear reason for giving such notice to the persons set out in Rule 2.20(2) in the absence of a QFCH under paragraph 26(1). Any person with the power to appoint an administrative receiver or administrator pursuant to a qualifying floating charge has, by necessity, a security interest that sets it apart from the majority of other creditors and interested parties. This right gives rise to the power to appoint an administrator over a company, even where the company or its directors wish to do so themselves. The filing of a notice of intention to appoint administrators by a company or its directors instigates an interim moratorium, whereby no insolvency proceedings or other legal process may be commenced without leave of the court.[115] Excepted from this interim moratorium is the right to appoint an administrator pursuant to paragraph 14 or an administrative receiver.[116] There is therefore clear justification for giving notice of an intended appointment to QFCHs. The same cannot be said for those parties set out in Rule 2.20(2).

82 Any duly charged enforcement officer, distrainer or supervisor of a voluntary arrangement[117] is not directly entitled to appoint an administrator over a company, but must make an application to court pursuant to paragraph 12. The right of such

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[114] Rule 2.6(3), Insolvency Rules 1986.
[115] Paragraphs 42-44, Schedule B1, Insolvency Act 1986.
[116] Ibid., at paragraph 44(7).
[117] Rule 2.20(2)(a)-(c), Insolvency Rules 1986.

parties is not accorded special consideration by the interim moratorium provisions, as is the case for QFCHs, thus they would need leave of court to make such an application during an interim moratorium.[118] These parties are therefore treated no differently to the company's common creditors, who are not entitled to any form of notice. Why, then, should the parties under Rule 2.20(2) be entitled to any notice at all? This question is addressed sensibly by HHJ McCahill in *Hill v Stokes*. As considered above, QFCHs:

> "…must be notified because of their power, as it were, to trump the proposal and put in their own preferred administrator."[119]

83 On the other hand, he opines that service on those persons in Rule 2.20(2):

> "…may be to prevent them from inadvertently interfering with the interim moratorium."[120]

84 The purpose of giving a "copy" of the notice of intention to appoint administrators is, as Norris J considered in *Virtualpurple*, to notify:

> "…those whose rights are immediately affected by a temporary suspension."[121]

85 It would not be possible to give notice to all creditors who could exercise such rights, whereas those actively enforcing recovery rights around the time of the proposed appointment, together with the company which could pass a winding up resolution, could easily be identified and notified. Indeed, the obligation to give notice to enforcement officers and distrainers only extends to those of whom the appointor has knowledge,[122] thus is not exhaustive.

86 It would appear logical that notice of an intention to appoint is given to those parties in Rule 2.20(2) to warn of the interim moratorium, and is therefore only necessary where notice is being given pursuant to paragraph 26(1) so as to give rise to that interim moratorium. This contention is further supported by the prescribed notice periods, or lack thereof, for Rule 2.20(2). QFCHs must be given at least five business days' notice. The company or directors are prevented from making an administration appointment until this period has either expired, or is waived by written consent of the QFCHs.[123] This period could be, and often is, reduced to naught by the QFCHs consenting immediately.

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[118] Paragraph 4, Schedule B1, Insolvency Act 1986.
[119] *Richard John Hill and Jonathan Scott Pope v Stokes Public Limited Company* [2010] EWHC 3726 (Ch), at paragraph 55.
[120] Ibid., at paragraph 56.
[121] *Re Virtualpurple Professional Services Ltd* [2011] EWHC 3487 (Ch), at paragraph 22(h).
[122] Rule 2.20(2)(a)-(b) Insolvency Rules 1986.
[123] Paragraph 28, Schedule B1, Insolvency Act 1986.

87 What notice, then, must be given to the parties in Rule 2.20(2)? The Rules are silent on this point, as is the Act. In addressing this, Morritt C resolved that:

> "…[a]s the latter provisions [the Rules] do not specify any notice period, presumably it must be a reasonable period."[124]

88 In *Msaada*, Warren J suggests that a reasonable period would be between five and ten business days, in accordance with the paragraph 26(1) requirements, even if there is no person to serve thereunder.[125] It would seem strange that Parliament intended a situation whereby a party entitled to make a superior appointment without recourse to the courts could consent to a quick appointment being made by the company or its directors, only for such an appointment to be held up by parties with much lower-ranking (and not enhanced) enforcement rights.

89 The "reasonable period" suggestion also creates problems where there is no QFCH to notify, as Warren J acknowledges. His solution is, however, somewhat baffling. Firstly, regarding notice on the company, he suggests that the directors could accept short notice,[126] apparently disregarding the issues arising in *Minmar* of directors acting improperly. With regards to the parties in Rule 2.20(2)(a)-(c), it is suggested that a short delay in the appointment in:

> "…the minority of cases that there will be persons who need to be given notice under Rule 2.20(2)…"

would not be incompatible with the statutory objective, but where:

> "…matters are really very urgent indeed, an emergency application can be made to the court for the appointment of an administrator."[127]

90 Such an approach surely goes against Parliament's intention of reducing the burden on the courts by the introduction of the out-of-court appointment process, as identified at the second reading of the Enterprise Bill on 10 April 2002[128] and in the judgment of Collins J in *Re Transbus International Ltd*.[129] Both Morritt C and

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[124] *Minmar (929) Ltd and another v Khalatschi and another* [2011] EWHC 1159 (Ch); [2012] 1 BCLC 798, at paragraph 63.
[125] *National Westminster Bank plc v Msaada Group (a firm) & Ors* [2011] EWHC 3423 (Ch), at paragraphs 59-60.
[126] Ibid., at paragraph 60.
[127] Idem.
[128] HC Deb 10 April 2002 vol 383 cols 44-115. See the comments of the Parliamentary Under-Secretary of State for Trade and Industry, Miss Melanie Johnson, at col 114 where she says, *inter alia*, "I reassure the House that the intention in company insolvencies is to disengage from active involvement of the courts, except in cases where there is dispute or complexity."
[129] *Re Transbus International Ltd* [2004] EWHC 932 (Ch). In particular see the comments of Collins J at paragraph 9, where he says "The purpose of the administration provisions, to create a more flexible, cheaper and comparatively informal alternative to liquidation, suggested a powerful argument for saying that the fewer application (sic) which need to be made to the court the better."

Warren J provide solutions which apparently fail to consider the effect and nature of specific provisions of the out-of-court appointment process and the purpose for which Schedule B1 was introduced.

91 Guidance as to a sensible approach can be found in the court's approach to the giving of notice by QFCHs pursuant to paragraph 15. In *Re OMP Leisure*,[130] it was held not necessary to give notice to a prior-ranking QFCH where the underlying debt had been extinguished but the security had not been released, as the prior charge holder had no power of appointment to exercise. On the other hand, in *Re Eco Link Resources*[131] the prior-ranking QFCH could have exercised the overriding power of appointment, and therefore failure to give notice did invalidate the purported appointment. The courts have therefore considered the impact on the rights extended to others by the Act when determining the requirement to give notice, and indeed the impact of not doing so. If similar logic were applied to the question of whether or not the parties in Rule 2.20(2) should be served with notice of intention to appoint an administrator by the company or directors, irrelevant of the presence of an enforceable qualifying floating charge, the answer would surely be in the negative, given the lack of enforcement rights bestowed on those parties in that situation.

Insolvency Service Guidance

92 The scope of the provisions contained in Rule 2.20(2) can also be understood through review of guidance issued by the Insolvency Service.[132] Although not having any legal standing, nor being approved by Parliament, this can shed light, especially on the Rules, given the secondary legislation was drafted by the Insolvency Service prior to approval by the Secretary of State.

93 Firstly, the Explanatory Notes to the Enterprise Act 2002[133] suggest that a notice of intention to appoint administrators need only be filed by the company or its directors where there is a QFCH pursuant to paragraph 26(1). In its absence, the company or directors must file only a notice of appointment.[134] It must, however, be borne in mind that the Explanatory Notes were published prior to the publication of the Rules.

94 Further insight is available from the Insolvency Service's regular guidance publication, "Dear Insolvency Practitioner". In October 2010, the Insolvency Service provided the following advice in response to queries from practitioners as

[130] [2008] BCC 67.
[131] [2012] EWHC (Ch) (unreported).
[132] The Insolvency Service is part of the Department of Business, Innovation and Skills. formerly the Department of Trade and Industry.
[133] Explanatory Notes to the Enterprise Act 2002.
[134] Ibid., at paragraphs 661-663.

to when notice of intention to appoint in Form 2.8B was required to be served pursuant to Rule 2.20(2):

> "It is our view that, when read together, paragraph 26(2) of Schedule B1 of the Insolvency Act 1986, Rule 2.20 and Form 2.8B should be interpreted to mean that paragraph 26(2) does not give rise to a standalone requirement to give notice of the intention to appoint an administrator. Form 2.8B is not a form that can be completed unless notice of intention to appoint is also being given under paragraph 26(1). Rule 2.20(2) requires that specified persons must be given a copy of the Form 2.8B notice (given under paragraph 26(1)) and a copy of the form cannot be made and given where no original form exists."[135]

95 This aligns with the judgments subsequently passed down in *Hill v Stokes* and *Virtualpurple*, and makes it clear that the body which prepared the Rules did not intend for Rule 2.20(2) to require service of notice of intention to appoint in the absence of a QFCH.

96 This guidance does, however, cause some confusion. Quite sensibly, the Insolvency Service states that Form 2.8B can only be used in conjunction with paragraph 26(1). On this basis, there is clearly no form prescribed for serving only on those persons listed in Rule 2.20(2) for the purpose of paragraph 26(2). The guidance does not, though, state that Rule 2.20(2) does not engage paragraph 26(2), but rather uses language suggesting that it does. Given that the requirements of paragraph 26(2) are not fulfilled by Rule 2.20(2), as set out above, this confusion could be put down to the fact that the guidance note is targeted expressly at resolving the issue of when to serve notice under Rule 2.20(2).

Attempts at Reform

97 Whilst there would appear to be a strong case to support the contention that Rule 2.20(2) is not a prescribing provision for the purposes of paragraph 26(2), neither Parliament nor the Government appear to have picked up on this. Rather, there are at present suggestions for reform of both Schedule B1 of the Act and wholesale reform of the Rules to address the issues raised by the interpretations of Rule 2.20(2) and paragraph 26(2). These appear to accept the apparent misinterpretation of these provisions, and as a consequence may cause further problems.

The Response of Parliament: The Deregulation Bill

98 On 23 January 2014, the Government introduced The Deregulation Bill 2013-14 to 2014-15 ("the Deregulation Bill"):

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[135] Dear IP Issue No 47 October 2010, Chapter 1, Article 15, available at: <www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/dearip/dearipmill/hardcopy.htm > (last viewed 30 November 2014).

> "…to make provision for the reduction of burdens resulting from legislation for businesses or other organisations or for individuals; make provision for the repeal of legislation which no longer has practical use; make provision about the exercise of regulatory functions; and for connected purposes."[136]

99 Described as:

> "…the Christmas tree Bill to end all Christmas tree Bills…"[137]

the Deregulation Bill addresses an extremely wide variety of issues, including at Part 2 of Schedule 6 provisions relating to the appointment of administrators out-of-court by a company or its directors.

100 The Deregulation Bill proposes to remove:

> "…a requirement in paragraph 26(2) … to give notice of intention to appoint an administrator to persons who are not themselves entitled to appoint an administrative receiver or administrator."[138]

101 The change is deemed necessary on the basis that if the company or its directors are intending to appoint an administrator, notice of the intention to appoint must be given to the persons set out in Rule 2.20(2), although:

> "…unlike those entitled to appoint a receiver or administrator [pursuant to paragraph 14], the prescribed persons cannot block the appointment of an administrator."[139]

102 As such, it is proposed that paragraph 26(2) will be restyled (with changes shown in italics) as:

> "26(2) A person who *gives notice of intention to appoint under sub-paragraph (1)* shall also give such notice as may be prescribed to such other persons as may be prescribed."[140]

103 The most obvious result of this change is that there would clearly be no need to give notice to the parties under Rule 2.20(2) if there is no QFCH. Whilst this change may at first sight be welcomed, for it clears up the fundamental issue left outstanding following the judgment in *Re BXL Services*, on closer inspection it may not be the solution it purports to be.

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[136] Deregulation Bill 2013-14 to 2014-15.
[137] Deregulation Bill HC Deb 27 February 2014 col 101. See the comments of Chi Onwurah MP.
[138] Explanatory Notes to the Deregulation Bill 2013-14 to 2014-15, at paragraph 471.
[139] Ibid., at paragraph 472.
[140] Paragraph 26(2), Schedule B1, Insolvency Act 1986, as amended by paragraph 6, Schedule 6, Deregulation Bill 2013-14 to 2014-15.

104 The change itself appears to be founded on a level of confusion and does not address the issues identified in the Deregulation Bill. The Explanatory Notes state that the rationale for the change is that:

> "…the prescribed persons cannot block the appointment of an administrator."[141]

105 This is of course incorrect, as any creditor could seek to block the appointment of an administrator, provided it was aware of the intended appointment.[142] Rather, the parties in Rule 2.20(2) cannot override the proposed appointment with their own nominee, unlike a QFCH.

106 More pertinently, the reform intends to avoid the:

> "…unnecessary delays in the administrator's appointment…"

caused by the:

> "…requirement to give notice to these prescribed persons … where there is no one else to whom notice of intention to appoint must be given."[143]

107 The effect will be that the persons prescribed by Rule 2.20(2) need only be given notice where there is a QFCH. Whilst such delay will be avoided where there is no QFCH, there could be further delay where there is a QFCH. As discussed in paragraphs 81-91 above, a QFCH can consent to an early appointment by the company or its directors by giving its written consent pursuant to paragraph 28(1)(b). Under the proposed reforms, the parties set out in Rule 2.20(2) would clearly be entitled to notice under paragraph 26(2) where there is a QFCH (which arguably they are not entitled to at present, despite the historic confusion). There is not, however, any mechanism by which these other prescribed parties can agree to an early appointment, nor any indication as to how much notice must be given.

108 One suggestion to this problem may be that any waiver by a QFCH under paragraph 28(1)(b) will automatically be binding on the persons in Rule 2.20(2). Were this the case, it would still not allow an almost immediate appointment by the company or directors. Pursuant to the Civil Procedure Rules, notice of the intention to appoint administrators on the Rule 2.20(2) parties will not be deemed to be served until the second business day after service.[144] Without provision for waiver of service by the persons in Rule 2.20(2), in a similar fashion to paragraph 28(1)(b), the reform will in fact prolong the period between the service of a notice of intention to appoint administrators and the subsequent appointment, despite the

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[141] Explanatory Notes to the Deregulation Bill 2013-14 to 2014-15, at paragraph 472.
[142] See, for example, *DKLL Solicitors v HMRC* [2007] EWHC 2067 (Ch).
[143] Explanatory Notes to the Deregulation Bill 2013-14 to 2014-15, at paragraph 473.
[144] CPR 6.14 as applied pursuant to rule 12A.3, Insolvency Rules 1986.

acknowledgment by the legislature that these persons have no superior rights that should cause delay.

109 Perhaps more worryingly for insolvency practitioners, is that if an appointment were to be made under paragraph 22 following consent from the QFCH, but before the notice is deemed to have been served on the additional parties, the appointment would likely be invalid for failure to properly serve on the prescribed parties. Given the clear requirement to give these parties notice as a result of the Deregulation Bill reforms, in contrast to the present obligations, the provisions of paragraph 104 and Rule 7.55 would not assist the invalidly appointed administrator. Consequently, the insolvency practitioner would be faced with an invalid appointment and exposure to possible personal liability.

110 The Deregulation Bill has been subject to much scrutiny in both Houses, however the proposed changes to paragraph 26(2) to not appear to have been considered in any of the Committee Debates before December 2014, with the insolvency provisions in Schedule 6 of the Deregulation Bill (Schedule 5 in the original Bill) being agreed in the Commons and Lords with no discussion of this issue.[145] It is of considerable concern that the amendment, which would appear to fail to fulfil its objectives, has faced such little scrutiny. Its passage onto the statute book could well open a further unwelcome can of worms.

The Response of the Insolvency Service: The Draft Insolvency Rules 2015

111 Prior to the Government's response, on 26 September 2013, the Insolvency Service launched a consultation entitled "Insolvency Rules 1986 – Modernisation of the Rules relating to Insolvency Law" ("the Consultation").[146] As the Consultation was issued before the Deregulation Bill, its amendments need to be considered independently of those proposed changes at this point. The Consultation set out proposals for the modernisation and recasting of the Rules, in order to make them more user-friendly and reduce red tape facing practitioners. This was to be achieved through the proposed Draft Insolvency Rules 2015 ("the Draft Rules"). The Draft Rules also contain some technical changes to:

> "…make insolvency procedures fairer and more efficient."[147]

112 Perhaps unsurprisingly, these changes include measures that seek to:

> "…address issues arising from the decision in *Minmar (929) Ltd v Khalatschi*"

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[145] Deregulation Bill HC Deb 6 March 2014 col 234 and Deregulation Bill HL Deb 28 October 2014 col GC396.

[146] "*Insolvency Rules 1986 – Modernisation of the Rules relating to Insolvency Law*" (The Insolvency Service), available at: <www.gov.uk/government/consultations/modernisation-of-the-rules-relating-to-insolvency-law> (last viewed 30 November 2014).

[147] Ibid., at paragraph 6.

regarding the notice requirements for directors when appointing an administrator.[148]

113 The provisions of Rule 2.20 are recast in rule 3.22 of the Draft Rules, which provides:

> "Notice of intention to appoint
> 3.22 (1) If paragraph 26 of Schedule B1 requires a notice of intention to appoint an administrator under paragraph 22 of that Schedule then the notice must—…
> (c) state—…
> (iii) the names and addresses of the persons to whom notice is being given in accordance with paragraph 26(1) of Schedule B1;…
> (3) If notice of intention to appoint is given under paragraph 26(1) of Schedule B1, notice under paragraph 26(2) must be given in the same terms and at the same time to—
> (a) any enforcement officer who, to the knowledge of the person giving the notice, is charged with execution or other legal process against the company;
> (b) any person who, to the knowledge of the person giving the notice, has distrained against the company or its property;
> (c) any supervisor of a CVA; and
> (d) the company, if the company is not intending to make the appointment."[149]

114 According to the explanatory notes accompanying the Consultation, rule 3.22(3) of the Draft Rules:

> "…makes it clear that notice to these persons need only be given in accordance with Schedule B1 paragraph 26(2) if a notice of intention to appoint is given under paragraph 26(1)…"

thereby addressing:

> "…the problem of invalid appointments resulting from the judgment in *Re Minmar*…"

as well as the length of notice.[150]

115 Whilst these changes may address the issue specifically considered in *Minmar*, they do not address the important wider issue raised by Warren J in *Msaada* as to the purpose of paragraph 26(2).[151] Arguably, the reference in rule 3.22(2) of the Draft Rules to notice being given to these parties under paragraph 26(2) could be interpreted as limiting the ability to introduce further legislation requiring service independent of paragraph 26(1).

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[148] Ibid., at paragraph 42.
[149] Rule 3.22, Insolvency Rules 2015 Consultation Draft.
[150] Ibid., Explanatory Notes to Part 3.
[151] *National Westminster Bank plc v Msaada Group (a firm) & Ors* [2011] EWHC 3423 (Ch), at paragraph 33.

116 The drafting of rule 3.22(3) of the Draft Rules makes it clear that the notice to be given to these parties is to fall within paragraph 26(2). This would mean that it is captured by the subsequent requirements of paragraph 28, whereby the appointment cannot be made until the notice has been properly served on all prescribed parties.[152] This raises the issue, considered in paragraphs 81-91 and paragraphs 98-118 above, that whilst the QFCH entitled to "trump" the directors' proposed appointment can waive the five business day notice period,[153] there is no provision for the parties in rule 3.22(3) of the Draft Rules to do likewise. The words:

> "…notice under paragraph 26(2) must be given in the same terms and at the same time…"

do not clearly suggest a possible shortening of the notice period.[154] As considered above, the company's entry into administration could therefore be delayed due to requirement to give notice to a party that has no direct right to interfere in the process, or worse still, a purported appointment could be invalid if these notice periods were overlooked.

117 An interesting change introduced in the Draft Rules, is the removal of the word "copy" from the service on the parties detailed in rule 3.22(3) of the Draft Rules. This implies an elevation in the status of these parties, as the Insolvency Service itself had previously distinguished the fact that the current regime requires only a copy of the notice to be given.[155] Whether this is an intentional shift in focus or an oversight is not clear, partly due to the fact that the Draft Rules do not prescribe any form, but rather set out at length the contents of any notice of intention to appoint.[156] The terms of paragraph 26 are clear that any notice of intention to appoint thereunder must be in the prescribed form,[157] and there does not appear to be any intention in the Deregulation Bill to change this, indeed the Explanatory Notes make reference to filing of the prescribed form.[158]

118 It would be possible for the "prescribed form" required by paragraph 26 to be interpreted as any document containing the prescribed contents set out in the Draft Rules. This would, however, be a dangerous path to follow. If a plethora of cases can arise as to the validity of an administrator's appointment where a prescribed form has been used, a relaxation so as not to require a standard form would no doubt lead to further confusion and, in turn, litigation to establish whether the requirements of the Act had been fulfilled. With no prescribed form and further

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[152] Paragraph 28, Schedule B1, Insolvency Act 1986.
[153] Ibid., at paragraph 28(2).
[154] Rule 3.22(3), Insolvency Rules 2015 Consultation Draft.
[155] Dear IP Issue No 47 October 2010, Chapter 1, Article 15, available at: <www.insolvencydirect.bis.gov.uk/insolvencyprofessionandlegislation/dearip/dearipmill/hardcopy.htm > (last viewed 30 November 2014).
[156] Rule 3.22, Insolvency Rules 2015 Consultation Draft.
[157] Paragraphs 26(2)-(3), Schedule B1, Insolvency Act 1986.
[158] Explanatory Notes to the Deregulation Bill 2013-14 to 2014-15, at paragraph 468.

confusion as to the interpretation and application of paragraph 26(2), it would appear that further work is needed for the Draft Rules to be fit for purpose and for the matter of paragraph 26(2) and its application to be settled.

Interaction of the Deregulation Bill and the Draft Rules

119 The Draft Rules were issued shortly before the provisions of the Deregulation Bill. It is, therefore, not clear whether the two were intended to interact, or if consequential amendments to the Draft Rules are envisaged by the Insolvency Service. The proposed amendments to paragraph 26(2) by the Deregulation Bill do not undermine the provisions of rule 3.22 of the Draft Rules. Indeed, arguably the two offer a level of clarification as to the issues raised initially in *Minmar*, and left unresolved by *Re BXL* Services, as to the requirement to serve notice of intention to appoint on the parties in Rule 2.20(2). These new provisions elevate the parties from their true position currently, being entitled to copy of any notice of intention to appoint being served on a QFCH pursuant to paragraph 26(1). If these reforms are brought in, both will entitle the persons in Rule 2.20(2) to actual notice, rather than simply a copy as under the Rules presently in force. This could have the apparently unforeseen, and surely unintended, consequence of delaying an administrator's prompt appointment where a QFCH is consenting, or even lead to invalid appointments if the notice periods are not carefully observed.

Conclusion

120 Whilst there has been much judicial and practitioner debate over the requirement to give notice of an intention to appoint administrators to the parties set out in Rule 2.20(2), it is arguable that this has been in vain. The provisions of paragraph 26(2) clearly state that the company or directors must give:

> "…such notice as may be prescribed to such other persons as may be prescribed."[159]

121 A systematic review of the provisions of the Rules and related prescribed forms shows that both elements of paragraph 26(2) have yet to be fulfilled.

122 As such, under the current legislation it is not necessary for a company or its directors to serve notice of an intention to appoint administrators on the parties in Rule 2.20(2) in the absence of a QFCH. This is supported by an analysis of the statutory purposes for giving such notice, the nature and rights of the parties listed in Rule 2.20(2), and the choice of language therein.

123 The courts have not, however, reached this conclusion. A number of contrary judgments have led to uncertainty and excess caution in the insolvency profession,

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[159] Paragraph 26(2), Schedule B1, Insolvency Act 1986.

which appears to have been ill-founded. The severity of the issue has led, albeit belatedly, to proposed reform to both the primary and secondary legislation, the interpretation of which lies at the root of the current problem. The reforms put forward by the Government and the Insolvency Service, in the Deregulation Bill and the Draft Rules respectively, seek to address the issues left outstanding following the judgment of HHJ Purle in *Re BXL Services*.

124 Whilst on first glance these reforms appear to do this, making it clear that service is not required on the persons in Rule 2.20(2) in the absence of a QFCH, as drafted they present further significant problems. Firstly, the reforms make it a clear requirement for notice of intention to appoint administrators, rather than simply a copy, to be served on the Rule 2.20(2) parties where notice is being given to a QFCH pursuant to paragraph 26(1). There is, however, no provision made for these persons to consent to an appointment being made before the expiry of five business days, as is the case for a QFCH. This could inadvertently prevent the prompt appointment of administrators by the company or its directors, or even result in purported appointment being invalid if the additional notice periods are not observed. Secondly, the Draft Rules do not prescribe any forms to be used in the appointment process, which is at odds with the requirements of Schedule B1 of the Act.

125 It is good to see the Government, through the legislature and departments, seeking to address the current problems facing the insolvency profession with regard to administration appointments. However, it can be seen that this could be done simply by the issuing of guidance clarifying the true, and surely indisputable, construction of paragraphs 22 to 30 of Schedule B1. If the current reform is pursued, attention needs to be given to the apparently unforeseen consequences, which could have a similar effect on the profession as the current drafting.